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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. ROBERT DALE HIGGINS, Petitioner.	2 CA-CR 2012-0130-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700698

Honorable Wallace R. Hoggatt, Judge

REVIEW GRANTED; RELIEF DENIED

Robert D. Higgins — Florence
In Propria Persona

H O W A R D, Chief Judge.

¶1 Petitioner Robert Higgins seeks review of the trial court's dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the following reasons, we grant review but deny relief.

¶2 After a jury trial, Higgins was convicted of child molestation, indecent exposure in the presence of a minor, tampering with evidence, and sixteen counts of

sexual exploitation of a minor. The trial court sentenced him to consecutive and concurrent prison terms, some presumptive and some partially mitigated, totaling 227 years. We affirmed his convictions and sentences on appeal. *State v. Higgins*, No. 2 CA-CR 2009-0374 (memorandum decision filed Jan. 7, 2011).

¶3 Higgins then filed a timely notice of post-conviction relief. After appointed counsel notified the trial court that he had reviewed the available record and could find no arguable issue for Rule 32 relief, Higgins filed a supplemental petition alleging ineffective assistance of trial and appellate counsel. Specifically, he alleged trial counsel had been ineffective in failing to (1) "investigate, depose, or subpoena witnesses stationed in Korea with [him] at relevant time-frame of 'receipt' of images"; (2) advocate that "'possession' of images [is not] actionable when computer is infested with viruses, keyboard is broken, and forensic software was required to access images"; or (3) "request [a] continuance or recess to discuss in-depth" the state's "last-minute plea offer." He alleged both trial and appellate counsel were ineffective in failing to (1) challenge Arizona's jurisdiction over the crimes alleged; (2) object at trial or raise on appeal "the jury instruction on 'indirect' touching or contact"; or (3) argue that counts two, three, and four of the indictment, which alleged molestation and two counts of sexual exploitation involving his then-four-year-old child, were "multiplicitous . . . in violation of the Double Jeopardy Clause of the constitution." He also alleged appellate counsel had been ineffective in failing to raise an Eighth Amendment claim of cruel and unusual punishment.

¶4 The trial court denied relief and dismissed the petition, finding Higgins had "not presented any material issue of fact or law which would entitle him to post-conviction relief" and "[n]o purpose would be served by further proceedings." *See* Ariz. R. Crim. P. 32.6(c) (providing for summary dismissal of petition). This petition for review followed.

¶5 On review, Higgins reasserts his claims of ineffective assistance of trial and appellate counsel and contends "[s]ufficient facts and allegations were set forth in his petition for post-conviction relief to warrant an evidentiary hearing at a minimum." A Rule 32 petitioner "is entitled to an evidentiary hearing only when he presents a colorable claim[—]one that, if the allegations are true, might have changed the outcome." *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). The determination of whether a claim is colorable and warrants an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988). Thus, we will not disturb a court's dismissal of a Rule 32 petition for failure to state a colorable claim absent an abuse of discretion. *State v. Krum*, 183 Ariz. 288, 293, 903 P.2d 596, 601 (1995). We find no abuse of discretion here.

¶6 Higgins acknowledges in his petition for review that the trial court dismissed all of his claims in "its general ruling," but notes the court did not separately address his claim that trial and appellate counsel had been ineffective in failing to argue the three counts involving his four-year-old daughter exposed him to "multiple sentences for a single offense in violation of the Double Jeopardy Clause." This does not change our decision on review. We review de novo whether charges are multiplicitous, *State v.*

Brown, 217 Ariz. 617, ¶ 7, 177 P.3d 878, 881 (App. 2008), and the court did not abuse its discretion in finding this claim, like the others Higgins raised, was not colorable, *see State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 112 (App. 2010) (abuse of discretion encompasses legal error). Because his underlying claim lacks legal merit, Higgins failed to show that trial or appellate counsel had performed deficiently in failing to raise it or that he was prejudiced by their omissions. *See State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006) (colorable claim of ineffective assistance of counsel requires showing of both deficient performance and resulting prejudice).

¶7 As described in our decision on direct review, convictions on these counts—for child molestation and two counts of sexual exploitation of a minor—were based on the following evidence:

> While using Higgins's desktop computer in October 2007, his girlfriend B. found and viewed a portion of a recently recorded video depicting Higgins and his then-four-year-old daughter, T. In the video, Higgins was naked, while T. was wearing only a t-shirt. Higgins, while masturbating, approached T. and appeared to speak to her, at which time she "went on all fours" and turned her "buttocks . . . towards him." Higgins then reached his hand toward her genitals and, according to B., "it looked like he had actually touched her genital area," . . . .

¶8 "The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense." *State v. Eagle*, 196 Ariz. 188, ¶ 6, 994 P.2d 395, 397 (2000). To determine whether a defendant has been punished twice for the same offense, we "examine the elements of the crimes for which the individual was sentenced and determine 'whether each [offense] requires proof of an additional fact which the other

does not.'" *Id.*, *quoting Blockburger v. United States*, 284 U.S. 299, 304 (1932) (alteration in *Eagle*). In this case, Higgins's two convictions for sexual exploitation of his daughter were based on one violation of A.R.S. § 13-3553(A)(1), which prohibits "[r]ecording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct," and one violation of § 13-3553(A)(2), which prohibits "[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging" such visual depictions. Contrary to Higgins's assertion, his recording the visual depictions of his daughter and his possessing those images on his computer were not a "single offense"; each requires proof of different conduct related to the images. As we explained in *State v. Paredes-Solano*, 223 Ariz. 284, ¶¶ 15-16, 222 P.3d 900, 906 (App. 2009),

> The actions listed in [Section 13-3553,] subsection (A)(1) cause harm to the child in the creation of the visual images, while the acts in subsection (A)(2) harm the child through the perpetuation of those images. Each subsection is violated by distinctly different conduct causing different kinds of harm to the child. The two subsections thus represent more than merely different ways of committing a single offense and, we conclude, create offenses that are separate and distinct.

¶9 Similarly, Higgins's molestation conviction required proof of entirely different conduct, specifically that he "intentionally or knowingly engag[ed] in . . . sexual contact . . . with a child under fifteen years of age." 1993 Ariz. Sess. Laws, ch. 255, § 29. Higgins's convictions for these three offenses were not multiplicitous, and did not violate double jeopardy. *Cf. State v. Price*, 218 Ariz. 311, ¶ 9, 183 P.3d 1279, 1282 (App. 2008)

("[F]or double jeopardy purposes, aggravated assault is not the same offense as armed robbery, and convictions for both offenses were constitutionally permissible.").

¶10 To the extent Higgins suggests consecutive sentences on these counts were impermissible because they "arose out of the same incident, the same continuous act involving one victim," we do not agree. Arizona prohibits the imposition of consecutive sentences for "multiple offenses that constitute a single act." *Id.* ¶ 13; *see also* A.R.S. § 13-116. But although the creation of the images and the molestation may have occurred at the same time, the possession of the images continued beyond their creation and was not limited to that time frame, but was a continuing offense.

¶11 Nor did the creation of the images and the molestation constitute a single act under Arizona law. As we explained in our decision on appeal, evidence was sufficient to convict Higgins of sexual exploitation of his daughter pursuant to § 13-3553(A)(1) based on his filming her when, "apparently at Higgins's direction[, she] turned her buttocks to face Higgins so that he could touch her genitals." This was separate from the evidence of his having had sexual contact with her, required to convict him of molestation; either offense could have been completed independently of the other; and each offense caused his daughter to suffer a separate risk of harm. *See Paredes-Solano*, 223 Ariz. 284, ¶¶ 10-11, 222 P.3d at 904 (recognizing "distinct, separable injuries to the child victim" in creating and possessing child pornography; child pornography poses greater threat than sexual abuse alone). Accordingly, consecutive sentences were permissible. *See, e.g., Price*, 218 Ariz. 311, ¶ 14, 183 P.3d at 1283 (test for whether conduct constitutes multiple acts permitting consecutive sentences).

¶12 In its ruling on Higgins's petition, the trial court clearly identified and thoroughly addressed each of his other claims and resolved them in a manner sufficient to permit this or any other court to conduct a meaningful review. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). No purpose would be served by repeating the court's analysis here. *See id.* Based on the record before us and the applicable law, the court did not err or abuse its discretion in assessing Higgins's claims or in dismissing his petition.

¶13 Therefore, although we grant review, we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge